FILE COPY

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1935**

---

## No. 696

---

CHICAGO GREAT WESTERN RAILROAD COMPANY,
A CORPORATION,
*Petitioner,*

*vs.*

MARY RAMBO, AS ADMINISTRATRIX OF THE ESTATE OF ROY C. RAMBO, DECEASED,
*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

---

H. E. STASSEN,
ELMER J. RYAN,
*Attorneys for Respondent,*
*Grand Building,*
*South St. Paul, Minnesota.*

CHARLES P. STONE,
*Owatonna, Minnesota,*
*On the Brief.*

The op
Statem
Argum
Summa
Po
Po
Po
Po
Conclu
Chicag
U. S.
Baltim
Title 4
Title 4
Title 4

# INDEX.

## Subject Index.


| | Page |
|---|---|
| ne opinion of the court below | 1 |
| atement of the case | 1 |
| rgument | 2 |
| mmary of argument | 2 |
| Point 1.—The case does not present any dispute as to the interpretation of any Federal Statutes or as to the principles set forth in any applicable decision of this Court | 3 |
| Point 2.—The evidence of the violation of the Federal Boiler Inspection Act, as it applies to locomotive headlights, was properly submitted to the jury and the Supreme Court of the State of Minnesota properly affirmed the judgment in the court below | 5 |
| Point 3.—The violation of the Federal Act was a proximate cause of decedent's death and the judgment of the trial court was properly affirmed by the Supreme Court of the State of Minnesota | 9 |
| Point 4.—The negligence of the decedent was not the sole proximate cause of his death | 10 |
| nclusion | 10 |


## Table of Cases Cited.


| | |
|---|---|
| icago, Milwaukee, St. Paul and Pacific Railway Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041 | 4 |
| altimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 69 L. Ed. 419 | 5 |


## Table of Statutes Cited.


| | |
|---|---|
| tle 45, Chapter 1, Section 23, U. S. Code Annotated | 3 |
| tle 45, Chapter 2, Section 53, U. S. Code Annotated | 3 |
| tle 45, Chapter 1, Section 7, U. S. Code Annotated | 4 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

# No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY,
A CORPORATION,
*Petitioner,*

*vs.*

MARY RAMBO, AS ADMINISTRATRIX OF THE ESTATE OF ROY C. RAMBO, DECEASED,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

### Opinion.

The opinion of the Supreme Court of the State of Minnesota in this matter is reported in 263 N. W. 112.

### Statement of the Case.

Respondent recovered for the death of her husband by petitioner's wrongful act. Petitioner moved for judgment notwithstanding but not for a new trial. This motion was

denied and judgment was entered. Petitioner appealed to the Supreme Court of the State of Minnesota. The judgment was affirmed on November 1, 1935 and petitioner applied for re-argument to the Supreme Court of the State of Minnesota. Said petition was denied on November 14, 1935, and judgment was entered. Petitioner filed its petition for a writ of certiorari on the 13th day of January, 1936.

Petitioner's summary statement of facts is somewhat deficient and contains some inaccuracies. The opinion of the Supreme Court of the State of Minnesota (R. 342-348) contains a more thorough and more accurate statement of the facts. Consequently, respondent will not set forth a detailed statement of facts herewith.

## ARGUMENT.

### Summary of Argument.

1. The case does not present any dispute as to the interpretation of any Federal Statutes or as to the principles set forth in any applicable decision of this Court.

2. The evidence of the violation of the Federal Boiler Inspection Act, as it applies to locomotive headlights, was properly submitted to the jury and the Supreme Court of the State of Minnesota properly affirmed the judgment in the court below.

3. The violation of the Federal Act was a proximate cause of decedent's death and the judgment of the trial court was properly affirmed by the Supreme Court of the State of Minnesota.

4. The negligence of the decedent was not the sole proximate cause of his death.

## I.

**The case does not present any dispute as to the interpretation of any Federal statutes or as to the principles set forth in any applicable decision of this Court.**

The Federal Statutes involved are Title 45, Chapter 1, Section 23, of the United States Code Annotated, which provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. * * *"

Title 45, Chapter 2, Section 53, of the United States Code Annotated, which provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of the chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.*" (Italics ours.)

and Title 45, Chapter 1, Section 7, which provides as follows:

> "Any employees of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

There was no dispute either in the trial court or in the Supreme Court or at any time in these proceedings as to the interpretation or applicability of these respective statutes. The dispute revolves solely and simply about the question of the sufficiency of the evidence.

Petitioner, in its petition (p. 9), states as its reason relied on for allowance of the writ of certiorari that the Supreme Court of the State of Minnesota has refused to follow the decision of this Court in the case of *Chicago, Milwaukee, St. Paul and Pacific Railway Company* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041. The principle enunciated by this Court in that decision is contained in the following language:

> "* * * if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *"
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

This principle of law was not disregarded by either the trial court or the Supreme Court. On the contrary, the evidence was specifically reviewed and considered and under the decisions of this Court found to be sufficient when con-

sidered with the inferences which the jury reasonably might draw therefrom to support the finding of the jury.

In fact, the Supreme Court of the State of Minnesota, in its opinion, specifically referred to the case of *Baltimore and Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 69 L. Ed. 419, in which this Court enunciated the same principle of law in almost identical language as that in the *Coogan* case.

II.

**The evidence of the violation of the Federal Boiler Inspection Act, as it applies to locomotive headlights, was properly submitted to the jury and the Supreme Court of the State of Minnesota properly affirmed the judgment in the court below.**

There are four distinct portions of the evidence which indicate that the headlight on appellant's train involved in this fatal accident did not comply with the law.

The first is the testimony of the engineer himself. He testified that he was looking ahead; that at a distance of seven, eight, or nine car lengths he noticed what appeared to be two dogs running on the track, and that not until he was five or six car lengths away was he able to distinguish the man and speeder (f. 223). This would be a distance of 250 or 300 feet, as each car is 50 feet in length (ff. 374, 375). Under the engineer's direct testimony, which was clearly given and repeated (f. 241), the headlight did not comply with the legal requirement. Clearly, the speeder upon the track, with the man sitting on a seat as high as a man's hips (ff. 82, 83) presented a larger object, and one more easily seen, than the statutory test of a dark object as large as a man.

The fact that the engineer when recalled to the stand by petitioner after an intervening talk with petitioner's claim agent (f. 754) stated that the distance might have been a

thousand feet (ff. 741-743) does not in any manner detract from the weight of his original testimony.

Petitioner's argument that the engineer was not looking 800 feet ahead is faulty since he actually was looking to the outer range of visibility as indicated by his inability to distinguish the speeder when first observed at approximately 400 feet.

The second important portion of the evidence which indicates that the headlight did not meet the legal requirements, was the testimony of the farm boy, Nicholas Schaack. This young man was standing off to one side of the track in a position where this entire accident unfolded before him on the raised elevation of petitioner's track (ff. 299-301, Exhibit C). He testified that he was unable to distinguish the man and the speeder until the train was within about one hundred feet of the speeder (ff. 301-303, 326-329); that the train whistled when within fifty feet of the speeder; and that the sparks began to fly from the wheels of the train when within one rod of the speeder (ff. 339, 340, 303, 304). His testimony was unshaken and in fact was strengthened on cross examination (ff. 325-333). He indicated the relative positions on the pictures that were in evidence (ff. 301-303, Exhibit C). These marks placed upon the pictures clearly corroborate his oral testimony when it is borne in mind that the telephone poles are about 175 feet apart (f. 669). His testimony as a whole clearly indicates that he was an observant witness testifying in a truthful, straight-forward manner. It should also be noted that he was interviewed on the morning after the accident by a claim agent of petitioner (f. 346).

The third important portion of the evidence bearing upon the violation of the Federal Act was the testimony of the fireman. His testimony that the setting of the brakes, the toot of the whistle, the explosion when the train hit the speeder, and the grinding of the wheels of the train over

the speeder, all seemed to come together (ff. 188-189), when taken with the engineer's testimony that he (the engineer) set his emergency brake immediately upon distinguishing the man and the speeder, clearly indicate that the headlight was defective, and that the engineer did not distinguish the speeder until practically upon it.

If the engineer had seen the speeder when he was the required 800 feet away, with the speeder travelling in the same direction at approximately one-third the speed of the locomotive, the train would have travelled in excess of 1200 feet before it overtook the speeder, even assuming no reduction in the speed of the train; and at least 14 seconds would have elapsed from the first setting of the brakes to the impact with the speeder. Clearly, if this length of time had elapsed during which the emergency brake was set, the train was slowing down and the whistle was blowing, the fireman would have had a distinct recollection of these events prior to the impact with the speeder and the grinding of the speeder under the wheels of the locomotive. Here again, then, the testimony indicates a defective headlight which prevented the engineer from distinguishing the speeder at the legal distance.

The fourth portion of this evidence which indicates strongly that the headlight was defective is the evidence as to the brake tests subsequently made. In two carefully conducted tests with the same equipment and the same engineer applying the brakes in the same manner as at the time of the accident, the train was brought to a stop in distances of 2,210 and 2,170 feet respectively (ff. 772-775, 778-780, 800-803). On the first test the speed was estimated as being 60 miles an hour (f. 778) and in the second test the speed was "clocked," and found to be 61 miles an hour (f. 780). This was the maximum speed permitted on this track (f. 814). The point at which the engineer was flagged

for these tests would correspond to the point at which he distinguished the man on the speeder. It is to be noted, however, that on the night of the accident the train travelled 2,327 feet from the point of actual impact with the speeder (ff. 366-368, 655). This clearly shows that the engineer did not distinguish the speeder until practically the moment he hit it. Conducted as carefully as they were with experts in attendance, these tests constitute very strong evidence that the headlight was defective and that the engineer did not get his "flag," that is, did not distinguish the speeder, until practically upon it.

It is respectfully submitted that any one of these four independent portions of evidence would be sufficient to make it a question of fact for the jury as to whether or not the headlight complied with the law. Taken all together, each corroborating the other, they almost conclusively prove that the headlight was so defective and so dim that the engineer was unable to see the speeder until just about as he hit it and that the boy in the field accurately saw the distances and succeeding rapid fire events.

In contradiction of this conclusion, petitioner urges the testimony of the chief electrician who testified that he happened to be riding on this particular train and checked the light immediately after the accident. At best, this would merely constitute contradictory evidence. When taken in light of the fact that this chief electrician claimed that the headlight as the train stood upon the track after the accident shone straight down the middle of the track for 1,000 feet (f. 569), when in fact the engine had stopped at the point of a curve and the headlight would obviously be pointing out to the side of the track (ff. 638-640), and in light of the further fact that this chief electrician testified that he had examined the headlight after the first accident, and that it was not then burning (f. 559), whereas both the fireman and engineer testified that it was burning (ff. 237, 150,

155), clearly this witness's testimony may be disregarded in its entirety.

It is respectfully submitted that this evidence was properly submitted to the jury by the trial court and that as stated by the Supreme Court of the State of Minnesota, these facts justified the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act.

III.

**The violation of the Federal act was a proximate cause of decedent's death and the judgment of the trial court was properly affirmed by the Supreme Court of the State of Minnesota.**

As stated by the Supreme Court of the State of Minnesota, in their opinion:

> "We do not doubt that if the headlight violated that act, the evidence warranted the jury in concluding that such violation or negligence caused or contributed to cause Rambo's death."

Travelling as he was in the same direction as the train, with the noise of his motor making it impossible to hear the train, the headlight of the locomotive would have been an invaluable warning to Rambo of the approach of the train. It is clear that he could have quickly and easily swung off the speeder to the right of the rails clear of the tracks had he been aware of the train's approach. Likewise with the two objects travelling in the same direction the engineer would have had a valuable opportunity to slow down his train as it overtook Rambo. This would have been an important contribution to the avoidance of the fatal accident.

All the evidence indicates that the train with its defective headlight suddenly overtook Rambo in the darkness, de-

priving the engineer of the opportunity to avoid the fatal collision, and depriving Rambo of the warning to which he was entitled.

IV.

**The negligence of the decedent was not the sole proximate cause of his death.**

It is clear that the sole proximate cause rule does not apply to the instant case. Rambo did not in any manner cause or contribute to the defective headlight. Any negligence that he might have been guilty of in the operation of the speeder was very properly found to be only contributing and hence not a bar to respondent's recovery. The negligence of petitioner as to its headlight was independent of any negligence on the part of decedent.

**Conclusion.**

It is, therefore, respectfully submitted that the case at bar is not one calling for the exercise by this court of its supervisory powers, and that the Supreme Court of the State of Minnesota has not decided a Federal question of substance in a way not in accord with applicable decisions of this Court. To such end, it is respectfully submitted that the petition for a writ of certiorari to the Supreme Court of the State of Minnesota be denied.

Respectfully submitted,

H. E. Stassen,
Elmer J. Ryan,
*Attorneys for Respondent,*
*Grand Building,*
*South Saint Paul, Minnesota.*

Charles P. Stone,
*Owatonna, Minnesota,*
*On the Brief.*

(7379-C)